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Supreme Court, U.S.

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No.

IN THE

Supreme Court of the United States

October Term, 1989

State of Wisconsin
ex rel. Richard R. Syre (real party in interest)
Petitioner,

vs.

James Williquette, Sheriff
of Vilas County, Wisconsin
Respondent.

On Petition for a Writ of Certiorari to the
Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Double Jeopardy Clause bar a prosecutor from seeking the extradition of a person based upon a conviction which has been reversed by an appellate court on grounds that the prosecutor's evidence was insufficient to sustain the conviction?

PARTIES TO THE PROCEEDINGS

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STATE COURT RULING SUBJECT TO REVIEW

This appeal is from the March 7, 1989, ruling of the Wisconsin Appellate Court, District III, affirming the order of the Vilas County Circuit Court (APPENDIX 1-2) which ruling became final on June 6, 1989, when the Wisconsin Supreme Court denied Petitioner's Request for Review.

JURISDICTIONAL STATEMENT

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1257 (3)

VERBATIM CONSTITUTIONAL PROVISION

Fifth Amendment to the United States Constitution:

" . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . "

STATEMENT OF THE CASE

On September 22, 1980, the Philadelphia District Attorney "wired" a union member, Gibbs, for the purpose of monitoring Gibbs' attempts to settle civil liabilities and criminal assault charges Gibbs had filed against fellow union members who Petitioner Syre represented as the union's lawyer. Consequently, Gibbs recorded himself, as he later testified, lying to Syre about his urgent need for legal and financial assistance.

Out of secretly recorded replies to lies deliberately calculated to ensnare Syre the Philadelphia District Attorney fashioned self-contradictory accusations alleging Syre's participation in an imaginary Teamster conspiracy to both bribe Gibbs as a witness in the assault prosecution of other union members and, at the same time, conceal the bribe from Gibbs as a "legal" civil settlement agreement. Needless to say, this dishonest prosecution failed, resulting in acquittals at every stage of the proceedings.

The Philadelphia District Attorney has steadfastly refused to accept the finality of the last acquittal won by Syre. This matter now comes before the United States Supreme Court as a result of attempts by Pennsylvania to extradite Syre from Wisconsin on a conviction set aside on grounds that the evidence was insufficient to sustain the conviction. (Uniform Criminal Extradition Act, Wis. Stats. Sec 976.03) In the extradition proceedings the Wisconsin Courts have denied asylum to Syre ruling that the question of double jeopardy is to be decided by Pennsylvania courts which refuse to consider Syre's claim. The contested judgment of acquittal was entered by the Pennsylvania Superior Court on September 2, 1983, saying:

"Statements twisted and taken out of context from a tape recording which failed in many instances to capture every word and phrase, may be construed in a variety of ways. The testimony presented by both sides is demonstrative of this analysis. However, we find the evidence does not support the verdict beyond a reasonable doubt that the appellant [Syre] attempted in any way to induce Gibbs to testify falsely, to withhold testimony, or to allude legal process. Accordingly, we reverse the conviction and order the appellant discharged.⁶

"6. The appellant raises a total of nine issues on this appeal, however, since we reverse based upon the lower court's refusal to grant a demurrer, we need not address the appellant's other contentions" *Commonwealth v. Syre*, 469 A 2d 1060, 1062 (Pa Super. 1983)

Government appeal of a defendant's successful demurrer is clearly forbidden by the principles of double jeopardy adequately explained by United States Supreme Court precedent. Nevertheless, the Pennsylvania Supreme Court unlawfully reversed this judgment of acquittal bringing the Pennsylvania Supreme Court and the Superior Court into conflict over factual conclusions drawn from direct observation of a lawyer's conduct induced by the prosecutor's interference in and secret recording of a lawful settlement transaction. Dissenting on the merits from the Pennsylvania Supreme Court's reversal Justice Zappala said:

"From a review of the record, I find, as did the Superior Court, that Appellee [Syre] dealt with Gibbs with the sole intent of settling the possible civil and criminal effects arising out of an assault on Gibbs. It is important to note that this is not a question of an individual attempting to contact or

influence a witness to a prosecution, but rather one of an attorney for one of the parties negotiating with the sole victim of an assault for restitution after the victim had expressed a desire to settle. The mere act of an attorney for a criminal defendant negotiating a complete settlement with the sole victim of the defendant's conduct which subjects said defendant to both civil and criminal liability is not violative of either the letter or the spirit of the witness tampering prohibition. Indeed, this practice is frequently utilized with approval by courts throughout the Commonwealth as a means of expediting the criminal system...

"[T]he evidence against appellee consisted of the tape recorded conversations between appellee and Gibbs... [I] cannot read those conversations or any other record evidence as supporting a criminal intent on appellee's part -- not even by a preponderance of the evidence and certainly not beyond a reasonable doubt...

"Because the judiciary must take care to ensure that law enforcement officers do not cross the line between active investigation and zealous advocacy of the public's interests, on the one hand, and active participation in the manufacture of crimes, on the other, my careful review of the entire record compels me to note my dismay at the questionable tactics employed in the instant case."

Commonwealth v. Syre, 489 A 2d 1340, 1346 -1349 (Pa. 1985)

The Pennsylvania Supreme Court majority opinion discounted the lawful settlement agreement described above by Justice Zappoala as only "ostensible" (489 A.2d, at 1342) and the actual payment of the funds as agreed as only "a subterfuge designed to conceal the witness tampering that the

jury found to have occurred on an earlier date, September 22, 1980.'" (489 A.2d, at 1346) The Pennsylvania Supreme Court substituted its own self-contradictory argument for evidence.

Because the conflict between the judges is based upon direct evidence Syre cannot claim innocence, although he has established that he is not guilty on all counts, without that claim of innocence being an accusation of dishonesty of those judges who have taken his statements out of context. This case, therefore, exemplifies the harm that occurs to the judicial process when courts disregard judgments of not guilty which under the Double Jeopardy Clause, as factual judgements in the defendant's favor, are "absolutely final, correct or not".

On September 2, 1983, the Pennsylvania Superior Court discharged Syre in accord with its recent rulings modifying Pennsylvania double jeopardy law to bring it in to accord with United States Supreme Court rulings. These double jeopardy rulings were *Commonwealth v. Smalis* filed on July 8, 1983, and *Commonwealth v. Zoller*, 465 A.2d 18 (Pa. Super. 1983) filed on August 19, 1983. On June 29, 1984, the Superior Court affirmed these cases *en banc*. *Commonwealth v. Smalis*, 480 A.2d 1046 (Pa. Super. 1984); reversed *sub nom. Commonwealth v. Zoller*, 490 A.2d 394 (Pa. 1985); reversed *sub nom. Smalis v. Pennsylvania*, 106 S.Ct 1745 (1986).

Disputed in this line of cases is whether a criminal defendant's successful demurrer, a judgment that the evidence against him is insufficient to sustain a conviction, is a ruling on the law which the government may appeal or a ruling on the facts which the government may not appeal. On May 5, 1986, the United States Supreme Court reversed the Pennsylvania Supreme Court and affirmed the Pennsylvania Superior Court in a unanimous opinion that double jeopardy principles barred government appeals from a defendant's successful demurrer as it constitutes a ruling on the facts favorable to the defendant.

After the Superior Court discharged him Syre moved from Pennsylvania to Wisconsin where he was not engaged in the practice of law. When the Pennsylvania Supreme Court reinstated the jury conviction it also reinstated Judge Stanley Kubacki's sentence placing Syre on probation and requiring that he provide one year's worth of community legal services in Philadelphia.

At the same time the Pennsylvania Supreme Court suspended Syre from the practice of law. The suspension made it impossible for Syre to fulfill the terms of Judge Kubacki's cynical sentence. The Pennsylvania Superior Court, on remand, reversed Judge Kubacki a second time, finding that Judge Kubacki's clerk prejudiced jurors against Syre.

"We hold that in the case *sub judice*, this presumption of prejudice simply cannot be overcome by the Commonwealth. The evidence, which overwhelmingly demonstrates that a representative of the court discussed the accused's guilt with those who would ultimately decide his fate, went beyond a likelihood of prejudice to an outright showing of actual prejudice ... Given the court officer's flagrant violation of these principles in the case before us, the verdict cannot stand. Reversed and remanded. Jurisdiction is relinquished.

Commonwealth v. Syre, 501 A. 2d 571, 673 - 674 (Pa. Super. 1985) (filed Nov. 29, 1985)

On December 12, 1985, Syre filed a civil rights suit in the Federal Court for the Eastern District of Pennsylvania asking for an order barring on jurisdictional grounds further government appeal. Syre claimed that the state's evidence was not merely insufficient but totally lacking depriving the court of even a pretext for subject matter jurisdiction. Syre

claimed that the charges were empty as alleging conduct that, if proven, was not criminal conduct and that the prosecutor's accusations were self-contradictory, self-serving, and alleged physically impossible conduct.

The Federal District Court took no immediate action, as it should have, on Syre's civil rights complaint. In the meantime, the Pennsylvania Supreme Court, while a defendant in Syre's civil rights action, appeared before the United States Supreme Court with a hidden agenda in justifying its exercise of jurisdiction to review and reverse evidentiary insufficiency decisions just as it had done in *Commonwealth v. Syre*. Unanimously, on May 5, 1986, the United States Supreme Court rejected the Pennsylvania Supreme Court's holding and affirmed the Superior Court's understanding of double jeopardy as the Superior Court had applied it to terminate the prosecution of Syre on September 2, 1983. *Smalis v. Pennsylvania*, 106 S.Ct. 1745 (1986)

On November 10, 1986, the Pennsylvania Supreme Court while still a defendant in Syre's suit to enjoin further prosecution reversed the Superior Court's second factual ruling in Syre's favor finding official interference with Jury deliberations. *Commonwealth v. Syre*, 518 A2d 535 (Pa 1986) *cert. denied*, 102 S.Ct. 1577 (1987)

On May 19, 1987, Syre asked the Federal District Court to enjoin further prosecution on the grounds of acquittal as recently clarified by the United States Supreme Court in *Smalis*. Abruptly, without any consideration of the double jeopardy issue, the Federal District Judge dismissed Syre's civil rights action. *Syre v. Pennsylvania*, 662 F. Supp. 550 (E. D.Pa., 1987) 845 F.2d 1015 (3rd Cir. 1988): *cert denied*, 102 L.ED. 112 (1988)

Immediately thereafter Judge Kubacki on his own modified

Syre's sentence to require that Syre provide 200 hours community service in Wisconsin. Syre refused to accept the transfer of sentence to Wisconsin asking instead that his double jeopardy right be respected and that he be allowed to pursue his appeal rights without interference. Refusing to consider the double jeopardy claim, Judge Kubacki treated Syre's claim as a probation violation and ordered Syre's arrest in Wisconsin on June 29, 1987.

The Vilas County Circuit Judge granted Syre asylum in Wisconsin on double jeopardy grounds on December 21, 1987. At the State of Wisconsin's request he revoked this decision on June 14, 1988. Syre appealed to the Wisconsin Appellate Court which denied his request for relief on March 7, 1989. On June 6, 1989, this decision became final when the Wisconsin Supreme Court denied Syre's request for review. (APPENDIX 3)

ARGUMENT

The Pennsylvania Supreme Court unconstitutionally reviewed and reversed the Pennsylvania Superior Court's judgment in Syre's favor finding that the prosecutor's evidence failed to prove Syre's alleged guilt beyond a reasonable doubt. *Smalis v. Pennsylvania, supra*. The exercise of extradition powers in Wisconsin under the Full Faith and Credit Clause is as lawless as the Pennsylvania Supreme Court's exercise of jurisdiction.

BY DEFINITION ACQUITTAL EXCLUDES GOVERNMENT APPEAL SEEKING REVERSAL

When reasonable minds differ on proof of fact there is reasonable doubt. Where a higher court reverses a lower court's judgment that proof beyond a reasonable doubt has

failed the judgments of the two courts contradict (impeach) each other's factual conclusions. However, only the high court judgment, that there is no reasonable doubt, is subject to absolute impeachment as a matter of fact and for this reason the law bars the government from appealing once a defendant has been judged not guilty.

An appellate court does not determine facts for purpose of proof unless the lower court's judgment of fact is "clearly erroneous". Since the "evidentiary sufficiency" test is the highest standard by which proof of fact is measured a judgment finding the failure of the government to meet this test cannot be reversed according to any set of rational principles.

A higher standard of truth is deductive certainty, but no material fact can be proven with deductive certainty. When, however, charges are self-contradictory their falsity can be proven with absolute certainty. The highest standard of certainty of knowledge, the principle of non-contradiction, can only be used to establish the absolute falsity of alleged fact and never the absolute certainty of alleged fact.

As the instrument by which society determines facts the courts need some protection from dishonest government allegations against defendants. By false accusation, only a prosecutor can create the circumstance that would cause the court to impeach itself absolutely. This protection of the court is given by the Double Jeopardy Clause's bar on government appeal of acquittals.

The highest standard of proof, logical certainty, can only be applied in affirming a just acquittal. Such absolute impeachment of the accuser is not permitted because that would turn the accusatory process against the accuser thus annihilating the accusatory process. The "evidentiary

insufficiency" decision is "absolutely final, correct or not" precisely because it does *not determine* any facts for or against any one but says only that on the evidence presented, as construed most favorably to the prosecutor, proof of guilt beyond a reasonable doubt has failed.

These self-evident rational principles are beyond question. They are the foundation of the United States Supreme Court's unanimous ruling that reviewing court evidentiary insufficiency decisions are "absolutely final, correct or not", under the Double Jeopardy Clause:

"Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal -- no matter how erroneous its decision -- it is difficult to conceive how society has any greater interest in retrying a defendant, when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty. [emphasis in original:]

The importance of a reversal on grounds of evidentiary insufficiency for purposes of inquiry under the Double Jeopardy Clause is underscored by the fact that a federal court's role in deciding whether a case should be considered by the jury is quite limited. Even the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal. [citations omitted] The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty

beyond a reasonable doubt. [citations omitted] Obviously a federal appellate court applies no higher a standard: rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." *Burks v. United States*, 437 U.S. 1, 16 - 17 (1978)

The notion entertained by many courts, and all the courts so far in this litigation, is that this ruling in *Burks* means double jeopardy applies to a court ordered acquittal only to bar the government from *retrying* the defendant not from *appealing* the defendant's favorable ruling to a higher appellate court when a jury conviction can be reinstated without the need of retrying the defendant. This notion is false and harmful to the process.

In *United States v. Burks* the United States Supreme Court for the first time pointed out that double jeopardy cases failed to make a distinction between reversals due to trial error (law) and those resulting from evidentiary insufficiency (fact). "We believe", the Court said, "that the failure to make this distinction has contributed substantially to the present state of conceptual confusion existing in this area of the law." *Burks*, at 15. On the same day it decided *Burks* the United States Supreme Court said in *United States v. Scott*, 437 U.S. 82 (1978) (Overruling *United States v. Jenkins*, 420 U.S. 358 (1975) that double jeopardy did not bar second trials when they were necessary to correct legal errors as opposed to factual errors.

"To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even

though innocent he may be found guilty.' *Green v. United States*, 355 U. S. 184) at 188. On the other hand, to require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *Scott*, 437 U.S., at 91.

The archetypical case of government oppression is the prosecution based on false and self-contradictory charges. In such a case the judicial institution is harmed because its proximate processes of truth determination are absolutely contradicted and, thus, misused by the prosecutor.

The logical conclusion of the process of proof, one that begins with the presumption of innocence, is the judgment that proof beyond a reasonable doubt has failed. The process cannot rationally go further. To avoid the court's self-impeachment and the possibility of reinstatement of a false verdict there must be a retrial of the defendant if his successful motion for acquittal is reviewed and reversed by a higher court. *Both* prosecutor and the defendant should be given the chance to present more evidence and reargue the case to avoid arbitrary reinstatement of potentially false jury verdicts as was the rule of law prior to *Burks*.

PRECISE DEFINITION OF ACQUITTAL IS A RECENT AND FUNDAMENTAL CHANGE IN THE LAW OF DOUBLE JEOPARDY

In *Burks* the United States Supreme Court, correctly applying fundamental principles of reason, ruled that double jeopardy barred a retrial thus overruling all prior law which held that double jeopardy did not apply to the evidentiary insufficiency decision. *Burks* was a fundamental correction of

prior misconceptions about the purpose of double jeopardy. Barring retrial on double jeopardy principles, as *Burks* unquestionably does, it follows necessarily as a matter of simple logic that *Burks* also bars government appeal of the defendant's successful motion for acquittal whether or not the court ordered acquittal comes before or after a judgment of conviction by the jury.

There is no absolute bar on government appeal and retrial of the defendant who successfully challenges a conviction except when he has been judged not guilty. It is the not guilty judgement of the court that is given absolute protection not the person.

The fundamental purpose of the Double Jeopardy Clause in protecting the judicial branch of government is obvious:

If prosecutors could retry defendants on the same charges after losing the case the court's judgments on law or fact would not be decisive. Because the Court's rulings are decisive the prosecutor must bring his best case. In exercising his discretion not to prosecute the prosecutor applies the same principles of fair trial that he knows will control the actual trial. Automatically the prosecutor rejects weak cases and does not overcharge for fear of weakening his good cases.

This simple rule guarantees fair trials and honest use of the power of accusation to the benefit of all society as well as the defendant. When finality of judgment of acquittal is the issue, as it is here, there is no "balancing of state and individual interests" for their interests are identical.

Cases testing double jeopardy's protection of the court, as opposed to the defendant, do not arise under the Constitution because they involve such an extreme disregard of a prosecutor's duty that they never occur. The deceptive use of direct evidence of electronic surveillance in this case,

however, has caused Pennsylvania authorities to transgress obvious limits on the prosecutor's accusatory power thus presenting a case where the integrity of the judicial process, a process the government used libelously in taking Syre's government recorded statements out of context, is itself the central issue.

The Pennsylvania Supreme Court gave itself authority to reverse Syre's appellate court acquittal finding that the prosecutor took Syre's statements out of context by ruling in the unrelated *Smalis* case that all evidentiary insufficiency decisions could be reversed as they were merely rulings on the law and not factual judgments. In doing so the Pennsylvania Supreme Court challenged a fundamental principle of logic that had to be corrected by the United States Supreme Court.

Accordingly, in *Smalis v. Pennsylvania*, 106 S.Ct. 1745 (1986) The United States Supreme Court said:

"The Commonwealth appealed to the Supreme Court of Pennsylvania, which reversed. *Commonwealth v. Zoller*, 507 Pa. 344, 490 A.2d 394 (1985). The court relied heavily on the statement in *United States v. Scott*, *supra*, that a trial judge's ruling in a defendant's favor constitutes an acquittal 'only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *Id.*, 437 U.S., 97, 98 S.Ct at 2197 (quoting *Martin Linen*, *supra*, 430 U.S., at 571, 97 S.Ct., at 1354). The court [Pa. Supreme Court] gave the following explanation of why the trial court's ruling on petitioners' demurrer is not within this definition of an acquittal:

In deciding whether to grant a demurrer, the

court does not determine whether or not the defendant is guilty on such evidence, but determines whether the evidence, if credited by the jury, is legally sufficient to warrant the conclusion that the defendant is guilty beyond a reasonable doubt . . . [Emphasis added]

'Hence, by definition, a demurrer is not a factual determination . . . The question before the trial judge in ruling on a demurrer remains purely one of law.

'We conclude, therefore, that a demurrer is not the functional equivalent of an acquittal, and that the Commonwealth has the right to appeal from an order sustaining defendant's demurrer to its case-in-chief. In such a situation, the defendant himself elects to seek dismissal on grounds unrelated to his factual guilt or innocence.' *Commonwealth v. Zoller, supra*, at 357-358, 490 at 357-358, 490 A.2d at 401.' *Smalis v. Pennsylvania* 106 S.Ct. 1745, 1747-1748 (1986) (*Smalis* was consolidated with *Zoller*).

Without discussing how circular the reasoning of the Pennsylvania Supreme Court is in the above quoted statement the United States Supreme Court reversed the Pennsylvania Supreme Court and affirmed the Pennsylvania Superior Court.

Why is the Pennsylvania Supreme Court wrong and the United States Supreme Court right in holding that the judgment that proof has failed is a judgment on the facts, not on the law?

1. The Pennsylvania Supreme Court confuses the use of

presumptions to establish that a burden of proof has been met and the use of presumptions that appellate courts use to make the rule of law clear. A defendant is presumed innocent so that the proof of guilt will be clear. Facts are presumed against the defendant -- that is, the state's evidence is "credited" -- so that the failure of proof beyond a reasonable doubt will be clear.

The presumption of innocence is necessary because usually people cannot prove the non-existence of alleged facts even though the allegations may indeed be false. If proof of innocence were required the accusatory process would be entirely arbitrary, there being no limit on the ingenuity of a dishonest prosecutor bent on bringing credible but still false charges.

In *Commonwealth v. Syre*, 489 A.2d 1340 (1985) the Pennsylvania Supreme Court credited the specious argument that the civil settlement was "ostensible" (thus concealing the alleged bribe) to find that Syre's conviction was warranted whereas the Superior Court credited the actual evidence itself to find the conviction was not warranted by the evidence. Simply put, the Pennsylvania Supreme Court disregarded the presumption of innocence and replaced it with a presumption of guilt.

It had taken the presumption that makes the Superior Court's judgment as to the prosecutor's *failure of proof* clear and in complete non-sequitur held that the presumptions of fact against Syre makes it own "ruling on the law" in reversing the Superior Court acquittal of Syre clear.

2. Proof beyond a reasonable doubt is the highest standard of proof of the law. Reversal of the lower court after it has found reasonable doubt is not on principle but on suspicion that the lower court has not honestly applied the rigorous

standards of the evidentiary sufficiency test requiring the lower court to construe the evidence most favorably to the prosecutor.

The peril to the process, however, is not in arbitrary acquittals but in reversal of just acquittals because that dishonesty can sometimes be proven with certainty. Therefore, a judgment that proof has failed is the *only* way facts may be decided in favor of the accused in an accusatory process of justice. That judgment on the facts is absolutely final, correct or not, precisely because it is *indeterminate*, deciding affirmatively no facts for or against anyone.

If defendants were entitled to *determinate* judgments of fact finding allegations false, then, the more it appeared that unjust acquittals could occur the greater the perceived risk that the accuser himself would become the victim of injustice. To protect the process from self-destruction acquittals may be no more than judgments that proof of alleged fact has failed and, as such, they must be final.

3. The notion that an evidentiary insufficiency decision presents a question of law and not a question of fact reverses the principle of non-contradiction by which all truth is tested. Knowledge of false allegation can be established to the point of certainty because allegations can be self-contradictory. The Pennsylvania Supreme Court treats proof of alleged fact as subject to stronger proof than falsity of allegation which is a total misconception of the concept of sufficient evidence.

CONFUSION ABOUT DOUBLE JEOPARDY IS WIDESPREAD

The Pennsylvania Supreme Court is not alone in its confusion which only increases the urgency facing the United States Supreme Court in articulating the rational principles underlying its correct definition of acquittal. Professor Peter Westen and Richard Drubel summarized the present state of

needless confusion in double jeopardy law:

“The failure is at the level of fundamental theory, and it touches everything the Court does. Sometimes the Court is said to be using a “ ‘bright line’ analysis”: Sometimes it is said to be using a ‘balancing test’. A defendant’s interest in finality is sometime ‘subordinate’ to the public’s interest in accurate prosecution; again it is said to be ‘absolute.’ ” The ‘heart’ of double jeopardy is sometimes identified as the ban on reprosecution following conviction; in other cases it is said to be the ban on reprosecution following acquittal. These paradoxes are the product of what the Court has aptly recognized as its own ‘conceptual confusion’ ”. (citations omitted) Westen and Drubel, *Toward A General Theory of Double Jeopardy*, *The Supreme Court Review*, (1978)

This state of confusion is only compounded by the confusion among courts and commentators that prevails in the law concerning the “ultimate” distinction between principle and practice, the elusive law/fact distinction:

“(‘Law’ and ‘fact’ are) equally expansible and collapsible terms ... It is readily acknowledged that the term ‘law’ is indefinable. No less difficult to bound is the orbit of that companionate phantom ‘fact’ ... No two terms of legal science have rendered better service than ‘law’ and ‘fact’. They are basic assumptions; irreducible minimums and the most comprehensive maximums at the same instant. They readily accommodate themselves to any meaning we desire to give them ... What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy. L. Green, *Judge and Jury* 270 (1930)” quoted from

Henry P. Monaghan, "Constitutional Fact Review"
Columbia Law Review, Vol 85. No. 2. page 233,
note 24.

LAW/FACT CONFUSION AND DOUBLE JEOPARDY CONFUSION HAVE THE SAME CAUSE

At the heart of the law/fact problem is confusion about the use of presumptions to make appellate court legal rulings clear (law) and the use of presumptions to make proof clear (fact). It is also necessary to keep in mind that the failure to meet the burden of proof does not determine facts, as does the conviction, but leaves them completely undetermined.

Therefore, while appellate courts must have power to state and correct any ruling on the law they need only correct, as a matter of proximate justice, *determinate* factual judgments that are clearly in error such as a conviction that cannot in reason and conscience be sustained. Law/fact confusion arises when a failure of proof actually *determines* facts for or against a party. This always happens when a party is required to prove the non-existence of an alleged fact which becomes increasingly difficult as circumstances in which the allegation is made become less well defined.

For example, when Syre's recorded statements were taken out of context government allegations of Syre's hidden evil intention in the "ostensible" civil settlement and "subterfuge to conceal witness tampering" required Syre to prove the non-existence of this falsely alleged evil intention. Obviously, this method of criminal accusation can be totally arbitrary. What is less obvious, but far more consequential, is that the more arbitrary such allegations are -- the more the prosecutor removes the defendant's statements from a known context -- the more obviously arbitrary the prosecution will be.

When charges are as arbitrary as they were in this case a judgment that the proof has failed actually determines the dishonesty of the charges. Therefore, when the Superior Court ruled that the Philadelphia District Attorney failed to prove Syre "attempted in any way to induce Gibbs to testify falsely" the Philadelphia District Attorney's challenge to this acquittal set the stage for the absolute self-impeachment of the Pennsylvania Supreme Court according to the principles of double jeopardy not just in violation of double jeopardy principles. By contradicting itself the Pennsylvania Supreme Court presented a supreme example of law/fact confusion.

In double jeopardy cases law/fact confusion is greatest where *the defendant claims his otherwise criminal conduct is excused or justified*. More generally, law/fact confusion is great in cases where *the prosecutor claims the defendant's otherwise lawful conduct is done with a criminal intention*. These cases involve the strong possibility of punishing a person for conduct that is generally considered ordinary, proper and even necessary. Cases involving freedom of the press, free speech, libel, and allegedly neglectful performance of official responsibility are included in this class of cases.

In all such cases the defendant's actions are not disputed but his good intentions are challenged. Criminal intentions must be inferred from overt conduct which is of the type like self-defense, free expression, or official discretion that society generally encourages and does not want to unduly limit.

What constitutes proof of an evil intention in the individual case constitutes the kind of overt action which will prove, as a matter of law, any defendant's criminal intent. In these types of cases, the proximate nature of proof of the fact of criminal intention clashes with the absolute requirements of judicial law making as it shall apply to all citizens similarly situated.

Therefore, under well developed principles of judicial review the United States Supreme Court in appropriate cases abandons the "clear error" test for appellate fact review and reconsiders all factual judgments of the lower court in determining the rule of law that shall apply in the case at hand and, correspondingly, for all citizens similarly situated. The United States Supreme Court calls this "constitutional fact review." The United States Supreme Court, however, has never made the mistake in holding that all decisions finding failure of proof beyond a reasonable doubt are rulings on the law subject to appellate review without reference to the presumptions necessary to make proof of guilt clear and the presumptions necessary to make the failure of proof of guilt clear.

Other federal courts and state courts, however, have made this fundamental error. A good example is *State v. Evjue*, 37 N.E.2d 50 (Wis. 1949)

In *State v. Evjue* the prosecutor proceeded under a Wisconsin law making it a crime to publish the name of a rape victim. William Evjue, the publisher of the Madison Capitol Times deliberately published the name of a rape victim after an out-of-state newspaper published her name. The district attorney filed charges. The trial judge ruled that the state law was unconstitutional. The Wisconsin Supreme Court reversed and on remand the same trial judge in a non-jury trial found the state's completely undisputed evidence insufficient to prove Evjue guilty beyond a reasonable doubt.

The State of Wisconsin appealed Evjue's acquittal. The Wisconsin Supreme Court, believing that the evidentiary insufficiency decision was an incorrect ruling on the law, held that the lower court had the power to nullify the law. It held double jeopardy barred Wisconsin from retrying Evjue and also barred the Wisconsin Supreme Court from correcting the trial court's error of law by ordering Evjue convicted.

The Wisconsin Supreme Court's "conceptual confusion" as to the law/fact distinction led the Court to misstate both the power of the lower court to nullify the law, which it does not have, and the lack of power in the higher court to correct an error of law, which it does have. The Wisconsin Supreme Court misconceived its disagreement with the lower court as to the constitutionality of the statute it had corrected on *Evjue*'s first appeal, with its disagreement with the lower court's factual conclusion as to *Evjue*'s excuse which, by the lower court's standards, nullified proof beyond a reasonable doubt as to *Evjue*'s criminal intent even though there were no facts, other than criminal intent, in dispute.

It is reasonable to believe the publisher had no intention of harming the person protected by the statute because her name had already been published. Interpreting the statute narrowly, no doubt, his true purpose was to challenge a law repugnant to a free press, because, among other reasons, the law gave the prosecutor enormous discretion to selectively prosecute, on his own expansive interpretation of the purposes of the law, any publisher the prosecutor disliked.

The *Evjue* case exemplifies a general dilemma in a free society with a republican form of government of balanced powers. As laws become more absolute and seek to punish ever more ordinary conduct the accusatory process becomes increasingly inquisitorial: The presumption of innocence becomes a presumption of guilt; the purpose of the proceeding becomes the enforcement of belief, not the law; and, the court loses its impartiality. Obviously, when the court appreciates the conduct the prosecutor seeks to punish he will hold the prosecutor to a higher standard of proof than when, perhaps on moral or political grounds, the court condemns the defendant's conduct.

Unquestionably, *State v. Evjue* and other Wisconsin precedents in accord with that case contradict United States Supreme Court double jeopardy pronouncements in *Burks v. United States*, *Smalis v. Pennsylvania*, and other precedents. Extradition of Syre in violation of his double jeopardy right cannot be justified under these Wisconsin precedents.

CONCLUSION

The United States Supreme Court should exercise its supervisory powers to ensure that the law is faithfully executed. This is particularly important in this case because the rule of law is identical to the rule of logic protecting the integrity of the judicial process. There are no grounds for reasonable differences in opinion. In such a case the interests of society in protecting the integrity of process by giving absolute finality to acquittals and the interests of the defendant are identical and, therefore, the right is absolute.

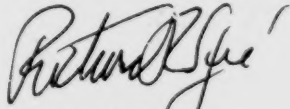
The appellate court evidentiary insufficiency decision is an acquittal that terminates prosecution because it is a judgment, correct or not, that the government failed to prove its factual allegations. Syre has obtained that judgment in the Pennsylvania Superior Court. The Wisconsin Courts are bound by the Constitution to give the judgment full faith and credit.

Since there has been great confusion in double jeopardy law the failure of the Supreme Court to act now further harms the judicial process as well as the rights of many individuals in pending cases. For example, the rule of law as stated in *Burks* and *Smalis* is contradicted in Pennsylvania by the Superior Court's January, 1987, ruling in *Commonwealth v. Fitzhugh*, 520 A.2d 424 (Pa. Super. 1987). The Indiana Supreme Court first applied *Smalis* correctly in *State v. Montecello*, 515 N. E. 2d 1070 (Ind. 1987); rehearing granted, 527 N.E. 2d 1111 (Ind. 1987), then contradicted its ruling on rehearing on

November 25, 1987. From cases such as *United States v. Greer*, 850 F.2d 1447 (11th Cir. 1988), it is clear Federal Circuit Courts of Appeals do not understand or correctly apply the rational principles upon which *Burks* and *Smalis* are founded.

The confusion in these cases and many others is perplexing only because fundamental rational principles have been misapplied leading to self-contradiction and arbitrary decision making. It is, therefore, respectfully submitted that the United States Supreme Court grand Petitioner Syre's request for Writ of Certiorari to the Wisconsin Supreme Court to clarify the double jeopardy bar on all government appeals from properly labeled evidentiary insufficiency decisions regardless of the appellate level at which the acquittal is entered.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Richard R. Syre".

Richrd R. Syre, *pro se*
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APPENDIX 1

STATE OF WISCONSIN

NO. 88-1386

IN COURT OF APPEALS, DISTRICT III

STATE OF WISCONSIN

ex rel. Richard R. Syre, Petitioner - Appellant

v.

JAMES WILLIQUETTE, Sheriff
of Vilas County, Wisconsin, Respondent.

APPEAL from an order of the Circuit Court for Vilas County:
JAMES B. MOHR, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, J. J.

PER CURIAM. Richard Syre appeals an order permitting his extradition to Pennsylvania. After a Pennsylvania Intermediate Appellate court overturned his conviction, it was reinstated by the Pennsylvania Supreme Court. Syre contends that the intermediate appellate court's reversal of his conviction constitutes an acquittal under the double jeopardy clause and prohibits Pennsylvania from attempting to enforce the reinstated conviction. We reject this argument and affirm the order.

APPENDIX 2

Syre was found guilty of witness tampering in the Pennsylvania state courts. The Pennsylvania Intermediate Appellate court twice reversed the conviction. In each instance, the Pennsylvania Supreme Court overruled the appellate court. In the first decision, the Supreme Court held the evidence sufficient to support the guilty verdict; in the second, it rejected alleged error in the trial. *Commonwealth v. Syre*, 518 A.2d 535 (Pa. 1986), and 489 A.2d 1340 (Pa. 1985).

We need not decide Syre's double jeopardy argument. Judicial review in extradition proceedings is limited. We may review only whether (1) the extradition documents are in order on their face; (2) the petitioner has been charged with a crime in the demanding state; (3) the petitioner is the person named in the request for extradition; and (4) the petitioner is a fugitive. *Michigan v. Doran*, 439 U.S. 282, 289 (1978). The courts of the asylum state do not provide plenary review of issues that can be fully litigated in the charging state. *Id.* at 290. Syre must litigate his double jeopardy claim in the Pennsylvania courts, and a review on the merits of that claim here exceeds the scope of an extradition review.

We note in any case that if this court were authorized to decide the issue, we would conclude that the double jeopardy clause did not prevent the Pennsylvania Supreme Court from reinstating Syre's conviction. The double jeopardy clause prohibits only those appeals by the government that pose a danger of subjecting the defendant to a second trial on the same offense. *United States v. Wilson*, 420 U. S. 332, 336 (1975). A defendant is not subjected to a second trial by a decision that reinstates a guilty verdict. *United States v. Jenkins*, 420 U.S. 358, 365 (1975). The Pennsylvania Supreme Court did not subject Syre to a second trial, it merely reinstated the guilty verdict.

APPENDIX 3

By the Court. -- Order affirmed

Publication in the official reports is not recommended.

Office of the Clerk
SUPREME COURT
State of Wisconsin

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The Court today announced an order in your case as follows:

No. 88-1386 *State ex rel. Syre v. Williquette* (T.C. #87 CV 141)

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of petitioner-appellant-petitioner, Richard R. Syre, and considered by the court,

IT IS ORDERED that the petition is denied, without costs.

